## Tee Ha Leong v Messrs Low & Lim & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S1–23–01 OF 1999
JAMES FOONG J
23 FEBRUARY 2005

*Civil Procedure — Absence of plaintiff — Dismissal of action due to — Plaintiff and witnesses absent at hearing — Counsels on both sides were present — Whether plaintiff had locus standi to set aside order of dismissal — Whether plaintiff should have appealed instead of making an application for dismissal — Rules of the High Court 1980 O 35 r 2 (1)*

The plaintiff filed a writ of summons accompanied by a statement of claim against the first defendant on 6 January 1999. On 27 September 1999, the first defendant took out third party notice against another who was subsequently made the second defendant in this case. On 21 June 2004, the court fixed 21 and 22 September 2004 for trial. Counsel present on the case management date (21 June 2004) made no objection to these trial dates. On 21 August 2004, the plaintiff's counsel wrote to the court requesting a postponement on the ground that the plaintiff had to accompany his son to the United Kingdom to enter a medical faculty in the University of London. This application was rejected by the court.

When this case came up for hearing on 21 September 2004, the plaintiff was absent. Both the defendants were present. So were their counsels. The plaintiff's counsel, who was present in court, informed that the plaintff had left for overseas and was unable to attend this hearing. He then made an oral application for a postponement based on the same ground previously advanced in his letter of 21 August 2004. Counsel for both defendants objected to this request for postponement. Finding that the reason forwarded by the plaintiff requesting for postponement unreasonable, the court disallowed the oral application and ordered the plaintiff's counsel to commence presentation of the plaintiff's case. Plaintiff's counsel informed this court that since the plaintiff himself was the only witness, he could not proceed, Accordingly, the court dismissed plaintiff's case with cost. The plaintiff made this application to reinstate his writ of summons and amended statement of claim.

**Held**, dismissing the plaintiff's application with costs:

There is a distinction between striking out and dismissing a case. If the case is struck out then O 35 r 2(1) of the Rules of the High Court 1980 can be utilised to apply for reinstatement. But when the case is dismissed, as in this instance case, then the avenue open to the aggrieved party is to appeal. This is based on the rational that the case was already heard on merits (see para 27).

[**Bahasa Malaysia summary**

Plaintif telah memfailkan satu writ saman bersama dengan satu penyata tuntutan terhadap defendan pertama pada 6 Jun 1999. Pada 27 September 1999, defendan pertama telah mengeluarkan satu notis pihak ketiga terhadap seorang lagi yang kemudiannya dinamakan defendan kedua dalam kes ini. Pada 21 Jun 2004 mahkamah menetapkan 21 dan 22 September 2004 sebagai tarikh untuk pembicaraan. Peguam hadir pada tarikh pengurusan kes (21 Jun 2004) dan tidak membantah tarikh pembicaraan. Pada 21 Ogos 2004, peguam bagi pihak plaintif telah menulis kepada mahkamah memohon untuk tundaan atas sebab bahawa plaintif terpaksa menemani anaknya ke United Kingdom untuk menyertai fakulti perubatan di University of London. Permohonan ini ditolak oleh mahkamah.

Apabila kes ini tiba untuk pembicaraan pada 21 September 2004, plaintif tidak hadir. Kedua-dua defendan hadir bersama peguam mereka. Peguam bagi pihak plaintif yang hadir di mahkamah memberitahu mahkamah bahawa plaintif telah ke luar negara dan tidak dapat menghadiri pembicaraan. Seterusnya beliau telah memohon secara lisan satu permohonan untuk tundaan pembicaraan atas sebab yang sama seperti surat yang ditulis pada 21 Ogos 2004. Peguam bagi pihak defendan-defendan membantah permohonan untuk tundaan. Mahkamah mendapati sebab yang dikemukakan oleh plaintif tidak munasabah dan menolak permohonan lisan itu dan mengarahkan peguam bagi pihak plaintif untuk meneruskan kes plaintif. Peguam bagi pihak plaintif memaklumkan mahkamah bahawa plaintif merupakan satu-satunya saksi dan oleh itu tidak dapat meneruskan kes. Maka, mahkamah menolak kes plaintif dengan kos. Plaintif membuat permohonan ini untuk menghidupkan semula writ saman dan penyata tuntuan yang dipinda.

**Diputuskan**, menolak permohonan plaintif dengan kos:

Terdapat perbezaan di antara kes yang dibatalkan dan kes yang dibuang. Sekiranya kes dibatalkan, A 35 k 2(1) Kaedah-kaedah Mahkamah Tinggi 1980 boleh digunakan untuk menghidupkan semula kes itu. Tetapi apabila satu kes dibuang, seperti dalam kes ini, pihak terkilan hanya ada pilihan untuk membuat rayuan. Ini adalah berdasarkan rasional kes sudah didengar atas merit (lihat perenggan 27).]

**Notes**

For a case on dismissal of action due to absence of plaintiff, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 2.

**Cases referred to**

*Armour v Bate* [1891] 2 QB 23 (refd)
*Beh Thian v City Specialist Centre Sdn Bhd & Anor* [1999] MLJU 517 (refd)

*Buga Singh v Koh Bon Keo* [1967] 1 MLJ 16 (refd)
*Gan Kim Kiat & Bros Realty Sdn Bhd v Leang Ah Kan* [1983] 1 MLJ 351 (dist)
*Perwira Affin Bank Berhad v YTC Realty Sdn Bhd & Ors* [2003] MLJU 111 (refd)
*Rachman v Tabrum* (1923) 39 LTR 380 (dist)
*Shaharuddin bin Abdul Rahman v Satisah Ismail Sdn Bhd* [1982] 2 MLJ 79 (refd)
*Tan Lee Siang & Ors v Kenneison Brothers Sdn Bhd* [1999] 5 MLJ 716 (refd)

**Legislation referred to**

Rule of The High Court 1980 O 35 r 2(1)
Subordinate Court Rules 1980 O 28 r 8, r 6(1)(a)

*V Rajadevan (Rajadevan & Associates) for the plaintiff.*
*V Krishnan (Kris, Edward & Derek) for the first defendant.*
*Khoo Eng Chin (Khoo & Sidhu) for the second defendant.*

**James Foong J**:

INTRODUCTION

**[1]** Enclosure 39 is an application of the plaintiff to reinstate his writ of summons and amended statement of claim.

**[2]** The two defendants in this case objected to this application.

**[3]** After hearing arguments from both sides, I dismissed this plaintiff's application with cost.

**[4]** Below are my grounds for doing so.

CHRONOLOGY OF EVENTS

**[5]** The plaintiff filed a writ of summons accompanied by a statement of claim against the first defendant on 6 January 1999. On 27 September 1999, the first defendant took out third party notice against another who was subsequently made the second defendant in this case.

**[6]** Summons for direction, was filed by the plaintiff on 14 July 1999 and from 21 March 2000 right up to 21 September 2004 the case was managed by this court. And on 21 June 2004, this court fixed 21 and 22 September 2004 for trial. Counsel present at this case management date made no objection to these trial dates.

**[7]** On 21 August 2004, the plaintiff's counsel wrote to this court requesting a postponement on the ground that the plaintiff has to accompany his son to the United Kingdom to enter a medical faculty in the University of London. This application was rejected by this court.

**[8]** When this case came up for hearing on 21 September 2004, the plaintiff was absent. Both the defendants were present. So were their counsel. The plaintiff's counsel, Mr Rajadevan, who was present in court, informed that his client has left for overseas and is unable to attend this hearing. He then made an oral application for a postponement based on the same ground previously advanced in his letter of 21 August 2004. Counsel for both defendants objected to this request for postponement. Finding that the reason forwarded by the plaintiff requesting for postponement unreasonable, I disallowed this oral application. This was based on the following reasons:

**[9]** First, realising that his earlier request for postponement was rejected the plaintiff still absent himself on the day of trial. Second, the task of accompanying his son to the United Kingdom could have been undertaken by someone else or by him personally at an earlier date so that he could return to attend the trial. Third, accompanying a child, who is of mature age, to study in the United Kingdom, whether in a medical faculty or otherwise, is not a necessity. There are numerous students these days who travel on their own to pursue their tertiary education overseas, unaccompanied by anyone. Fourth, this is a pre 2000 case. The Chief Justice has not only given, but has constantly reminded the courts throughout the country, to give priority to dispose off cases registered before the year 2000. And after intense case management, this case was finally set down for trial with all relevant documents to be tendered agreed upon by the parties. Fifth, two clear days have been set aside for this trial and the plaintiff has full knowledge of this. A postponement would incur substantial loss, both as to time and man power, just to accommodate the plaintiff so that he could have his way.

**[10]** After the plaintiff's counsel's oral application for postponement was refused, this court ordered the plaintiff's counsel to commence presentation of the plaintiffs case. Mr Rajadevan informed this court that since the plaintiff himself is the only witness, he could not proceed, Accordingly, I dismissed the plaintiff's case with cost.

ANALYSIS OF ENCLOSURE 39

**[11]** By the manner and approach adopted in this application, the plaintiff is treating the order of the court handed down on 21 September 2004 as a striking out order. This is not a correct reflection. To reiterate, this case was not struck out on 21 September 2004; it was dismissed. This means that when the plaintiff was called upon to present his case on merits, he could not do so. The effect of this 'is the same as it were a judgment dismissing the action on merits' — see Mallal's Supreme Court Practice, (2nd Ed) at p 423 citing the case of *Armour v Bate* [1891] 2 QB 23.

**[12]** The plaintiff then argued that O 35 r 2(1) of the Rules of High Court ('RHC 1980') permits:

> Any judgment or order obtained where one party does not appear at the trial may be set aside by the court, on the application of that party, on such terms as it thinks just.

**[13]** To support this, a number of cases were cited. I shall analyse them in turn.

**[14]** The first case cited is the decision of KC Vohrah J in *Tan Lee Siang & Ors v Kenneison Brothers Sdn Bhd* [1999] 5 MLJ 716. The facts of this case are these: The sessions court has dismissed the plaintiff's claim at the date of trial due to the absence of the plaintiff and his witnesses. The plaintiff then applied to reinstate the case. This application was disallowed by the sessions court judge on ground that the plaintiff has no locus standi to make this application since the avenue opened to the plaintiff was only by way of an appeal; not reinstatement.

**[15]** KC Vohrah J found that under O 28 r 8 of the Subordinate Courts Rules, which is para material to O 35 r 2(1) of the RHC, the plaintiff has locus standi to apply to set aside the judgment entered against the plaintiff in his absence. This is due basically on the rational that 'the judge would have no hearing of the case on merits' when the case was dismissed.

**[16]** KC Vohrah J cited passages in two cases to support of his decision. The first is *Gan Kim Kiat & Bros Realty Sdn Bhd v Leang Ah Kan* [1983] 1 MLJ 351, a judgment of Justice Peh Swee Chin. The brief facts of *Gan Kim Kiat & Bros Realty Sdn Bhd v Leang Ah Kan* are these: The defendant and his solicitors were present while the plaintiff and his client were not. The learned magistrate 'struck out' the action of the plaintiff. The plaintiff applied to reinstate citing mistake in advising the plaintiff of the wrong hearing date. The magistrate granted the application for reinstatement. Dissatisfied, the defendant appealed to the High Court. Peh J dismissed this appeal.

**[17]** But in this case, Peh Swee Chin J did not specifically rule on this point of locus standi to appeal. The appeal by him was an appeal relating to a striking out order. In fact he spoke of the distinction between 'dismissing' a case and 'striking out' (see p 353 of the judgment) with these:

> If he (magistrate) had refused a request for adjournment, (which he did not), then he should have dismissed the action with costs instead of striking out the action.

**[18]** I am of the view that this case of *Gan Kim Kiat & Bros Realty Sdn Bhd v Leang Ah Kan* seems to suggest if the learned magistrate had gone by way of dismissing the plaintiffs' claim rather than striking out the case, then the appeal against the magistrate's decision may have changed the course of things.

**[19]** The next case cited by KC Vohrah J in support of his decision is *Rachman v Tabrum* (1923) 39 LTR 380 at 381. But then again this case involved a striking out situation rather than the case being dismissed.

**[20]** From the judgment of KC Vohrah J, there is a case referred: *Shaharuddin bin Abdul Rahman v Satisah Ismail Sdn Bhd* [1982] 2 MLJ 79. But the learned judge was of the view that 'it is not exactly on point'. But after perusing this case, I find some interesting comments by Ajaib Singh J, the judge who decided on the matter, on this issue before this court. Before I proceed to disclose the relevant comments, the facts of that case are briefly these: At the hearing before the magistrate, the plaintiff and his counsel were present. The defendant was absent but his counsel was in court. The learned magistrate gave judgment in favour of the plaintiff under O 28 r 6(1)(a) of the Subordinate Courts Rules 1980 which reads:

> If, when an action, other than actions which O 43 and O 45 apply, is called on for hearing, the plaintiff appears but the defendant does not appear, the court may if the defendant has no counterclaim, on proof of service give judgment for the plaintiff on his claim.

**[21]** The defendant appealed to the learned judge against this decision of the magistrate. In allowing the appeal, the learned judge made these observations:

> Similarly if the plaintiff is absent but his counsel is present when an action is called on for hearing the court cannot just dismiss the action but must allow the plaintiff's counsel to present his case and call witnesses if he has any in support.

**[22]** What was described is the very situation in this instant case. The plaintiff was absent. His counsel was present. His counsel was called upon to present his client's case by calling any witnesses. Since the plaintiffs counsel had none to offer, the plaintiffs claim was dismissed.

**[23]** Learned counsel for the plaintiff then brought to my attention the case of *Beh Thian v City Specialist Centre Sdn Bhd & Anor* [1999] MLJU 517. I find this case of not much assistance since it involves a completely different point of law. It relates to reinstatement of an originating summons to extend the time to file notice of appeal by the plaintiff against the sessions court's decision.

**[24]** Another case highlighted is *Perwira Affin Bank Berhad v YTC Realty Sdn Bhd & Ors* [2003] MLJU 111. This case again is of little help since the application for reinstatement is on a striking out order rather than a case being dismissed.

**[25]** Then there is the case of *Buga Singh v Koh Bon Keo* [1967] 1 MLJ 16 with the following facts: At the trial before the magistrate, the plaintiff and his counsel were absent but the defendant and his counsel were present. The learned magistrate dismissed the plaintiffs' case. This was allowed. When the appeal was heard by Raja Azlan Shah J (as his Royal Highness then was) this was recorded:

> To my mind, so long as the claim shows some merits and justice can be done by compensating the other side for any costs thrown away, then a new trial ought to be ordered.

**[26]** But it must be noted that this was at the appeal stage after the magistrate has dismissed the plaintiff's case. This differs from our present scenario: should it be by way of an appeal after dismissal or reinstatement?

**[27]** Having considered the above authorities, which are all made- by courts of concurrent jurisdiction, I am of the view that there is a distinction between striking out and dismissing a case. If the case if struck out then O 35 r 2(1) of the RHC can be utilised to apply for reinstatement. But when the case is dismissed, as in this instance case, then the avenue open to the aggrieved party is to appeal. This is based on the rational that the case was already heard on merits.

**[28]** Even if I have erred on this of law and that the plaintiff has locus to apply to reinstate this action I am of the opinion that this application should fail for reason that the plaintiff has, to quote the words of Peh Swee Chin J in *Gan Kim Kiat & Bros Realty Sdn Bhd v Leang Ah Kan* 'either intentional or contumacious' absent himself during the hearing date despite being informed that his case would be heard and his application for adjournment disallowed well in advance before the date of hearing. And his attendance could have been maintained for reasons expressed earlier such as making alternative arrangement to accompany his son for enrolment into a university overseas.

*Plaintiff's application for reinstatement dismissed with costs.*

Reported by K Krishnan